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In The

Supreme Court of the United States

October Term, 1995

JESUS MACIAS-MUNOZ,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. BOTSFORD
Counsel Of Record
100 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 480-9764
(512) 476-8434 (FAX)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires a heightened standard of proof for a first offender sentenced to life imprisonment without parole in a narcotics conspiracy in which the determination of the amount of drugs occurs at the sentencing hearing, rather than at the trial itself.

2. Whether the two-level enhancement for "restraint of victim" violates the grouping rules under U.S.S.G. § 3D1.2(c).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

1. Petitioner-Appellant-Defendant Jesus Macias-Munoz.

2. Respondent-Appellee-Plaintiff United States of America.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner, Jesus Macias-Munoz, by and through his counsel on appeal only, respectfully presents this petition to review an opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioner's direct appeal from his conviction is contained in *Appendix A. See United States v. Gaytan, et al.*, 74 F.3d 545 (5th Cir. 1996). No opinion was delivered in connection with the March 13, 1996, denial of Petitioner's motion for rehearing. *See Appendix B.* The issues raised in this petition were adversely decided against Petitioner by the Court of Appeals.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . "

The United States Sentencing Guidelines, § 3A1.3, provides:

> "If a victim was physically restrained in the course of offense, increase by 2 levels."

The United States Sentencing Guidelines, § 1B1.3(a)(1)(B), provides:

> (a) Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level. . . .
>
> * * *
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;. . . .

The United States Sentencing Guidelines, § 3B1.1, provides:

> Based on the defendant's role in the offense, increase the offense level as follows:
>
> > (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

The United States Sentencing Guidelines, § 3D1.2, provides:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
>
> > (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

The United States Code, Title 21, § 851(a), provides:

> **Proceedings to establish prior convictions**
>
> (a) Information filed by United States Attorney
>
> > (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing

> by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

STATEMENT OF THE CASE

The first question presented relates to the sentencing phase of this case. Jesus Macias-Munoz is a thirty-eight-year-old first offender who was sentenced under the Sentencing Guidelines ("U.S.S.G.") to life imprisonment without parole. He is serving his sentence at the federal penitentiary at Marion, Illinois. The life sentence is based upon a "historical" narcotics conspiracy in which the quantity of drugs was estimated by the uncorroborated statements of an unindicted co-conspirator.[1]

The second question presented is the propriety of the two-point increase petitioner received for "restraint of a victim" under U.S.S.G. § 3A1.3. This issue is a case of first impression under the grouping principles of the Guidelines, and the two-level enhancement increased petitioner's offense level to a level forty-four (44), which required the imposition of a life sentence without parole.

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[1] At trial, the term "historical conspiracy" was described as a conspiracy which is proven solely by the testimony of a co-conspirator well after the fact.

Petitioner and thirteen other defendants were named in an eleven-count indictment which charged them with a conspiracy to import a quantity of more than five (5) kilograms of cocaine. (R.101)[2] Petitioner was not charged with any substantive drug offense.

Prior to trial, petitioner and his co-defendant (Rene Gandara) made every effort to ascertain the amount of narcotics allegedly involved in the conspiracy. The Bill of Particulars (6 R.365), Motion to Dismiss for Vagueness, and Motion *in Limine* Regarding the Scope of the Conspiracy (7 R.498) filed by Petitioner and one of his co-defendants were all denied. At trial, the government was only required to prove that the conspiracy involved more than five kilograms. In order to prove the "historical" conspiracy, the government primarily relied upon the testimony of their first witness, Jaime Carrera. Carrera,

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[2] Count One charged in totality:

> That commencing on or about June 1988, and continuing thereafter, up to and including on or about June 1992, in the Western District of Texas and elsewhere, Defendants wilfully and knowingly conspired, combined, confederated, and agreed together, and with each other, and with others to the Grand Jury known and unknown, to commit offenses against the United States, in violation of Title 21, United States Code, § 963, that is to say, they conspired to import a quantity of more than 5 kilograms of cocaine, a Schedule II Controlled Substance, into the United States from Mexico, contrary to Title 21, United States Code, §§ 952(a) and 960(a)(1).

Count Two charged the same persons with a conspiracy to distribute the cocaine, in violation of 21 U.S.C. § 841(a)(1).

an alleged co-conspirator, received a grant of immunity and was facing a term of mandatory life when he agreed to cooperate. (18 R.280-88) He also admitted to a long history of drug usage. (18 R.363)

While these factors are significant, there were two even more serious problems with Carrera's testimony. First, prior to his testifying at trial, Carrera made fifteen (15) statements to the Federal Bureau of Investigation ("FBI"). The statements were contained in FBI 302's and were provided to the defense as part of the discovery materials. At trial, it was demonstrated that Jaime Carrera's prior statements substantially contradicted his testimony at trial and, in fact, many of the statements contained in one FBI 302 interview contradicted other statements contained in another FBI 302 statement.[3]

Possibly, the inconsistencies in Carrera's testimony could be tolerated if there were some corroboration of his testimony. However, the only corroboration that was offered by the government was the testimony of Jaime's brother, Gabriel Carrera. Moreover, the government did not even attempt to substantiate this information. Significantly, there were several avenues that the government did not pursue which might have corroborated the statements made by Jaime Carrera. For example, Carrera testified that in December 1991, when he became a cooperating government witness, he gave the FBI copies

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[3] Some of the inconsistent statements included how he became involved in the conspiracy, how many deliveries actually occurred, the dates of deliveries, names of individuals involved, the amounts of cocaine, and the amount of drug proceeds. (18 R.279-395)

of all of his cellular telephone records for the relevant time period. (18 R.299) These documents could have provided critical corroboration to verify who, if anyone, he called as to each of the deliveries. The cellular records could have proved whether his trial testimony or his prior statements were the truth. The government never tendered these records to the defense, nor did they attempt to admit them.

Second, the Carrera brothers testified that two individuals, Junior Luis Gomez and Juan Macias, allegedly helped unload a number of the deliveries of cocaine. (R.212) The government certainly could have called them as witnesses. Most significantly, because Jaime and Gabriel testified that Beto Adame was present to help unload every delivery. Yet, when Adame testified as a witness at trial, the government never asked him any questions about any of the deliveries.

Finally, Carrera testified that as part of his cooperation agreement, he was required, if asked, to tape record conversations. After he began cooperating, the conspiracy was still in existence, and he testified that he had several conversations with various co-defendants on the phone. (18 R.303) However, the government never attempted to record these conversations. Nor did the government offer any telephone records to corroborate these calls. Despite the many contradictions and the lack of corroboration, Carrera's testimony constituted the bulk of the evidence introduced against Petitioner. Significantly, since there were no substantive drug transactions, it was the only evidence offered as to the quantity of drugs involved in

the conspiracy. The jury convicted Petitioner of the conspiracy charges, money laundering and a conspiracy to kidnap.

In the pre-sentence report ("PSR"), the government took the position that Petitioner was responsible for at least 1,500 kilograms of cocaine. Petitioner filed a lengthy response in opposition, in which we urged that, at best, the government's evidence showed that Petitioner was responsible for forty-five (45) kilograms. The court rejected petitioner's argument and found, by a preponderance of evidence standard, that the conspiracy consisted of at least 1,500 kilograms, which placed him at a thirty-eight (38) offense level under the Guidelines. The court then imposed a two-point increase for a weapon under U.S.S.G. 2D1.1(b)(1). Additionally, the court imposed a four-point increase under U.S.S.G. § 3B1.1, "role in the offense," and enhanced petitioner's offense level by two (2) points for a victim-related adjustment under U.S.S.G. § 3A1.3. Thus, petitioner's total offense level was forty-six (46), which required that he be sentenced to a term of life imprisonment without parole.

Petitioner appealed his conviction in the United States Court of Appeals for the Fifth Circuit. In the appeal, he raised a number of issues relating to errors committed at trial and at sentencing. The court reversed one count of money laundering, set aside two of the four mandatory life sentences (due to the applicable statutory maximum punishment of five years on those two counts) and in all other regards affirmed his conviction and sentencing.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS REQUIRES A HEIGHTENED STANDARD OF PROOF FOR A FIRST OFFENDER SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE IN A NARCOTICS CONSPIRACY IN WHICH THE DETERMINATION OF THE AMOUNT OF DRUGS OCCURS AT THE SENTENCING HEARING RATHER THAN AT THE TRIAL ITSELF

A. The Fifth Circuit Erred in Refusing to Require a Heightened Standard of Proof in Light of the Magnitude of the Difference Between a Sentence Based Upon a Term of Years and a Life Sentence Without Parole

The indictment in this case charged a conspiracy to import and deliver over five (5) kilograms of cocaine. At trial, the government was not required to prove the amount of drugs purportedly involved in the conspiracy. However, at sentencing, the offense level for a defendant is determined by the quantity of the drugs which are attributed to him. This quantity includes both drugs with which the defendant was directly involved, and drugs that can be attributed to the defendant in a conspiracy as part of his "relevant conduct" under § 1B1.3(a)(1)(B) of the Guidelines. *United States v. Carreon*, 11 F.3d 1225, 1230-31 (5th Cir. 1993). In its version of the offense in the PSR, the government contended that petitioner was responsible for over 1,500 kilograms of cocaine. The government's calculation was based solely on the uncorroborated statements of the unindicted co-conspirator Jaime

Carrera. The PSR adopted virtually all of the drug quantities discussed in the testimony at trial and attributed them to petitioner.[4]

The computation of petitioner's sentencing guideline range was initially challenged through written objections to the PSR and were re-argued at the sentencing proceeding. Sentencing Tr. 2-40. Despite the detailed objections to the quantities, the district court summarily adopted the conclusion of the PSR:

> I think a preponderance of the credible evidence introduced in the case indicates that Mr. Macias was involved in the conspiracy and a member thereof at least as early as January 1990, and that thereafter he participated in, was involved in, or other conspirators handled in such a way that was reasonably foreseeable to him, not less than 1,500 kilograms of cocaine. I agree with the base level of 38. (24 R.40)

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[4] The standard of proof problem is exacerbated in drug cases. Recently, in *United States v. Rodriquez*, 73 F.3d 161 (7th Cir. 1996), the defendant, a thrice-convicted felon, was convicted on a narcotics conspiracy and was sentenced to a term of mandatory life based upon a preponderance of evidence standard. Chief Judge Posner, in his dissenting opinion in the denial of the petition for rehearing and suggestion for rehearing *en banc* succinctly stated the reality of most drug prosecutions:

> Given that evidence presented at a sentencing hearing is often unreliable, both because the rules of evidence are not enforced in such hearings and because evidence of quantity of drugs sold is ordinarily given by criminals, the defendants' former associates, the risk of error cannot be reckoned trivial; and the magnitude of the potential error is enormous. *Id.* at 163.

Thus, without making any specific findings of fact and based only on a preponderance of evidence standard, the court sentenced petitioner, a first offender, to life imprisonment without the possibility of parole. The question is whether, under these circumstances, due process requires a heightened standard of review.

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the defendant challenged a Pennsylvania statute that imposed a mandatory minimum prison sentence of five years for a defendant found at sentencing by a preponderance of the evidence to have "visibly possessed a firearm" in connection with his offense of conviction. This Court held that the statute did not violate the Due Process Clause. The Court did, however, take pains to place limits upon its holding:

> [The challenged statute] operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [The statute] "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The statute gives no impression of having been tailored to permit the visible possession finding to be a *tail which wags the dog of the substantive offense.*

Id. at 88 (emphasis added). While not expressly setting forth a test to determine when the Due Process Clause would require a higher standard, this Court suggested that a different question would be presented if the magnitude of a contemplated sentence is sufficiently great that the sentencing hearing can be characterized as "a tail which wags the dog of the substantive offense." *Id.* This

is precisely what occurred in this case. Petitioner, a first offender, was charged and tried for a conspiracy which involved "more than five kilograms." The government was not required to identify or prove a specific amount of drugs at trial. Yet, at sentencing, the court adopted the government's finding that petitioner was responsible for at least 1,500 kilograms of cocaine. This amount of drugs and the other adjustments imposed by the court set the offense level at forty-six (46), which required the mandatory imposition of a life sentence without parole.

In petitioner's response to the PSR, he asserted that, at best, the government's evidence showed that petitioner could be held accountable for one transaction which consisted of forty-five (45) kilograms of cocaine ("James Street").[5] If the court found that forty-five (45) kilograms was the correct amount of drugs and imposed the same adjustments, the offense level would have been forty (42), which provides for a sentence of 360 months to life. Thus, petitioner could have been sentenced from thirty (30) years to life as opposed to a life sentence without parole. Petitioner asserts that the magnitude of the difference between a sentence of thirty (30) years and a sentence of life imprisonment without the possibility of parole is the

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[5] The government's evidence of the James Street transaction was significantly different than the evidence offered regarding the historical conspiracy. Several co-defendants who pled guilty testified as to the James Street transaction. (20 R.658) Significantly, unlike the Carrera testimony, the government offered substantial corroboration of the co-conspirators' statements, including taped telephone conversations and surveillance, as well as a seizure of cocaine. (21 R.1047-55)

type of disparity that requires a heightened standard of review.

While the Fifth Circuit, in *United States v. Mergerson*, 4 F.3d 337, 344 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1310, 127 L.Ed.2d 660 (1994), acknowledged that *McMillan* teaches that under certain circumstances a higher standard may be required, the court refused to follow this principle in this case. In fact, in rejecting petitioner's argument, the court erroneously analogized petitioner's case to *Mergerson*. *See United States v. Gaytan*, *supra* at 588. *Mergerson*, however, is distinguishable in three critical aspects. First, in sentencing Mergerson, the district court did not even apply a preponderance of evidence standard, but in fact applied a clear and convincing evidence standard.

Second, Mergerson was charged with substantive drug violations. Thus, the nature of the evidence relied upon by the court was quantitatively different than the evidence relied upon in this case. But the most significant difference between this case and *Mergerson* is that the court found that, regardless of the standard of proof that was employed, Mergerson had eight prior convictions and was going to be sentenced as a career offender, and because the minimum mandatory penalty in the case, he would have been sentenced to thirty (30) years in any event, with the maximum sentence of life. Thus, the Court found that the district court's finding did not have the "dramatic effect upon sentencing necessary to require the reasonable doubt standard to be considered." *Id.* at 344.

The opposite is true here. Petitioner is a first offender and there were no mandatory-minimums involved in this case. Had the district court applied a heightened standard of proof, petitioner asserts that the evidence would not support a finding of at least 1,500 kilograms, and petitioner would have been sentenced to a term much different than mandatory life without possibility of parole.

The effect here is to permit the highest penalty outside of death itself to be imposed, not for conduct charged nor determined by the jury, but for conduct determined by the court at sentencing without the usual procedural protections such as the requirement of proof beyond a reasonable doubt, or even clear and convincing evidence.[6]

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[6] In fact, a sentence of mandatory life under the Guidelines does not provide any procedural safeguards that are found in other federal statutes. Under the death penalty statute, 18 U.S.C. § 3591, *et seq.*, an accused is entitled to a special hearing to determine whether a sentence of death is justified, proof of mitigating factors, a requirement that aggravating factors are established beyond a reasonable doubt, the requirement of a unanimous decision, and special precautions to ensure against discrimination. Likewise, under 21 U.S.C. § 851(a), if the government seeks to increase a sentence based upon a prior conviction, the United States Attorney must file an information stating, in writing, the previous convictions to be relied upon. None of these procedural rights are afforded a person facing mandatory life without parole.

B. There Are a Number of Compelling Reasons Why This Court Should Establish Guidelines as to When a Heightened Standard of Review Must be Implemented

There are a number of compelling reasons why this Court should establish guidelines as to when a heightened standard of review must be implemented. First, prior to the Sentencing Guidelines, sentences of life imprisonment without parole were almost non-existent in the federal system. However, according to the Sentencing Commission, from October 1994 to September 30, 1995, 165 persons were sentenced under the Guidelines to life imprisonment without the possibility of parole. *See* United States Sentencing Commission 1995 Annual Report at 83. This figure does not include the sentences of persons who were sentenced to life imprisonment as a result of a mandatory minimum range, or career offenders. Despite the significant number of life sentences that have been imposed, this Court has yet to review a case which specifically addresses the due process considerations of a standard of review in a life imprisonment case such as this.

Second, *McMillan v. Pennsylvania* should be revisited because, as noted by one commentator, the Pennsylvania statute at issue is an inadequate analogy for the Guidelines:

> This inadequacy stems from the fundamental differences between the Guidelines' sentencing regime and the Pennsylvania regime at issue in *McMillan*. Previous Supreme Court decisions on the burden of proof in criminal cases involved sentencing schemes in which the trial judge

> enjoyed a large amount of discretion; such discretion does not exist under the Guidelines. With a discretionary approach, a judge not only weighs a wider array of considerations, he also factors into the sentencing calculus his relative degree of certainty relating to each consideration. Under the Guidelines, however, judges must assign fixed weights to factual determinations at sentencing, regardless of their relative degree of certainty (as long as the preponderance standard is met); the presence of discretion makes the *McMillan* decision meaningfully different. Because of this inadequacy, one must apply a more general due process analysis, which suggests that in implementing the Guidelines trial judges should adopt clear and convincing evidence as the standard of proof at sentencing.

Richard Husseini, "Adopting Clear and Convincing Evidence as the Burden of Proof," 57 University of Chicago L.Rev. 1387 (1990) at 1404-05.

Third, the Sentencing Guidelines do not explicitly adopt a standard of proof required for relevant conduct and, as noted in Justice White's opinion in *Kinder v. United States*, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992) (dissenting from the denial of *certiorari*), "we have not visited this issue since its new procedures took effect in November 1987." 119 L.Ed.2d at 216. This lack of standards has caused confusion for the district courts as well as defendants. In sentencing petitioner in this case, the district court articulated the dilemma:

> I think that's an issue that some higher court will have to wrestle with. . . . [I]f the arguments that you've made constitutionally or otherwise

> are found meritorious by a higher court, then they can either remand the case to us for re-sentencing or they can reverse and render or do whatever they may see fit. (24 R.45)

This court is the higher court to which the district court passed the burden of decision. Further, the problem faced by the district court in this case is shared by other courts as well. Significantly, while every circuit generally acknowledges that *McMillan* stands for the proposition that there may be a case where the sentencing enhancement is so extreme as to require a higher standard of proof than the preponderance standard, a review of the cases demonstrates a lack of understanding as to when this may occur and the need for this Court to establish standards.[7]

In the recent opinion of *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995), the First Circuit fully set forth the complex issues involved with the standard of proof in mandatory life cases. In *Lombard*, the defendant was originally tried in state court for murder and was acquitted. Subsequently, he was indicted and convicted in federal court on firearms and other charges arising out of the murders. At sentencing, under the Guidelines, the district court found by a preponderance of evidence that he has used the guns to commit "another offense" (murder).

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[7] *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993); *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990); *United States v. Restrepo*, 946 F.2d 654, 661 n.12 (9th Cir. 1991); *United States v. Townley*, 929 F.2d 365, 370 (8th Cir. 1991); *United States v. Crockett*, 812 F.2d 626 (10th Cir. 1987); *United States v. Corbin*, 998 F.2d 1377, 1387 (7th Cir. 1993); *United States v. Julian*, 922 F.2d 562, 569 n.1 (10th Cir. 1990).

Based upon this finding, *Lombard* was sentenced to life without parole. The court found that this is a case in which the life sentence enhancement is the "tail which wags the dog." *Id.* at 177. Thus, the court vacated the life sentence and remanded for a determination regarding the propriety of a downward departure.

Lombard is critical in many ways. First, the court expressed a fundamental understanding of the profound consequences of a sentence of mandatory life. In its thorough analysis, the court stated that the enhancement "operated not merely to ratchet up his prison term by some fractional increment, but rather wholly to remove the defendant's sentence from the term of years continuum and transform it into a life sentence without the possibility of parole." Interestingly, the court then cited a number of quotations from prior opinions of this Court that graphically demonstrate this Court's awareness of the issue:

> That punishment represents "the second most severe penalty known to the law," *Harmelin v. Michigan*, 501 U.S. 957, 996, 111 S.Ct. 2680, 2702, 115 L.Ed.2d 836 (1991) (Scalia, J.). It qualitatively differs from any lesser sentence in resting upon a determination that the "criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of that perpetrator." *Id.* at 1027, 111 S.Ct. at 2719 (Stevens, J., dissenting) (citation and quotation marks omitted); *see also Helm v. Solem*, 684 F.2d 582, 585 (8th Cir. 1982) ("A life sentence without parole differs qualitatively from a sentence for a term of years" because it represented the "total[] reject[ion] of rehabilitation as a basic goal of our

criminal justice system."), *aff'd*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

Id. at 178. In short, the court found that the enhancement at issue not only increased the duration of Lombard's sentence, but placed his punishment on an entirely different order of severity.

Petitioner asserts that the increasing number of life sentences, coupled with the lack of an explicit standard of proof under the Sentencing Guidelines, requires this Court to establish guidelines as to when a heightened standard of review must be implemented. This is an issue of nationwide importance that should be decided by this Court.

II. THE TWO-LEVEL ENHANCEMENT FOR "RESTRAINT OF VICTIM" UNDER U.S.S.G. § 3A1.3 VIOLATED THE GROUPING PRINCIPLES UNDER THE GUIDELINES

Petitioner's sentence on the conspiracy counts was increased from a level forty-four (44) to a level forty-six (46) based on a two-level enhancement for a victim-related adjustment under U.S.S.G. § 3A1.3.

Petitioner's position is that the district court, in adding a two-point enhancement to counts I and II, did what is expressly prohibited by the Guidelines. The grouping rules, in conjunction with instructions governing cross-referencing in multiple-count convictions, forbid the result that was achieved in this case.

Petitioner was convicted on eight counts. Counts I and II were drug conspiracy counts. Counts III and IV

were money laundering counts. Counts VIII and IX were conspiracy to commit kidnapping. Counts X and XI were use of a telephone in interstate commerce. According to the PSR, Counts I, II, III, VI, X and XI constitute one group. The kidnapping counts stood alone in Group Two and Group Three. Restraint of victim is characteristic of the kidnapping charged in Group Two. It was agreed by all parties that the "restraint of victims" enhancement could not be added to the kidnapping count. In order to be able to enhance the sentence imposed on a count by reference to another count, they must both be members of the same group. U.S.S.G. § 3D1.2(c), Application Note 5.[8]

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[8] Application Note 5 provides:

> Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice,

Petitioner asserted below and herein that the victim-related adjustment associated with the kidnapping conspiracies contained in Groups Two and Three should not apply to Group One, including counts I and II, because one cannot apply criminal behavior contained in one group as an aggravating factor to a count in a different group.

The grouping principle employed in petitioner's PSR followed the proper rationale contained in the Guidelines. Thus, the counts in Group One (drug conspiracy and money laundering and use of the telephone) have society as their victim. In contrast, the kidnapping counts had two specific victims, two different individuals. However, while the district court correctly recognized the inappropriateness of applying the victim-related adjustment to the two money laundering counts, the court failed to see that, in this case, it was equally inappropriate to apply it to the two drug conspiracy counts. Thus,

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which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases only the counts representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

the two-level enhancement violates the grouping principles carefully articulated in the Guidelines.

Petitioner seeks this Court to review the propriety of this enhancement because of the drastic consequences to petitioner, particularly upon a remand for a resentencing if review is granted on the first question presented herein.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID L. BOTSFORD
State Bar No. 02687950
Counsel Of Record

100 Congress Avenue, Suite 1700
Austin, Texas 78701
512/480-9764
512/476-8434 (FAX)

APPENDIX A

Copr. (C) West 1996 No claim to orig. U.S. govt. works
74 F.3d 545
(Cite as: 74 F.3d 545)

UNITED STATES of America, Plaintiff-Appellee,

v.

Alfredo GAYTAN, Jesus Gregario Macias-Munoz, a/k/a Jesse Macias, and Rene Gandara-Granillo, Defendants-Appellants.

No. 95-50055.

United States Court of Appeals,
Fifth Circuit
Jan. 23, 1996.

Defendants were convicted in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, Chief Judge, of various drug-related offenses, including conspiracy to import cocaine and conspiracy to possess cocaine with intent to distribute. Defendants appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) indictment provided adequate notice of the conspiracy charges; (2) fatal variance did not exist between evidence at trial and indictment's allegations in conspiracy counts; (3) statute authorizing roving wiretap surveillance is constitutional; (4) any error in order authorizing wiretap surveillance was corrected by district court's exclusion of improperly intercepted conversations; (5) there was sufficient evidence that defendants conducted financial transactions with proceeds of unlawful activity to support some of their money laundering

convictions; (6) district court's findings regarding quantity of drugs attributable to defendants for sentencing purposes were proper; (7) evidence supported application of weapon sentence enhancement with regard to kidnapping and drug conspiracy convictions; and (8) restraint of coconspirators supported application of restraint of victim sentence enhancement to drug conspiracy convictions.

Affirmed in part, reversed in part, vacated in part and remanded for resentencing.

David L. Botsford, Botsford & Sauer, Austin, TX, for defendant-appellant.

Appeals from the United States District Court for the Western District of Texas.

Before GARWOOD, SMITH and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The defendants appeal their convictions and sentences on a number of charges arising from their involvement in a massive drug trafficking conspiracy. We affirm in part, reverse in part, vacate in part, and remand for resentencing.

I.

Between June 1988 and June 1992, Rene Gandara-Granillo ("Gandara") and Jesse Macias-Munoz ("Macias") were the leaders of a large-scale cocaine operation based in El Paso, Texas. Besides trafficking in cocaine, they arranged the kidnapping, torture, and interrogation of

several of their associates who failed to account for missing cocaine or funds. Alfredo Gaytan was a lower-level operative in the conspiracy who participated in several meetings involving the drug transactions, and on at least one occasion stored and counted large quantities of cocaine at his residence. Altogether, the conspirators may have moved over 8,000 kilograms of cocaine during the course of several years.

A federal investigation utilized undercover agents, extensive surveillance, wiretapping of the defendants' cellular phones, information provided by coconspirator, and the co-conspirators' post-arrest statements. The investigation culminated in an eleven-count indictment charging the defendants with conspiracy to import cocaine (count one), conspiracy to possess cocaine with intent to distribute (count two), money laundering (counts three through seven), conspiracy to kidnap (counts eight and nine), and use of a telephone with intent to commit a crime of violence (counts ten and eleven). Counts one and two named thirteen coconspirators and referred to others "known and unknown."

After a lengthy trial, Macias was found guilty on counts one, two, three, six, eight, nine, ten, and eleven; Gandara was found guilty on counts two, four, five and eight; and Gaytan was found guilty on count two but acquitted as to count one. Macias and Gandara were sentenced to life imprisonment, while Gaytan received a 188-month sentence.

II. Alleged Errors in the Indictment

Counts one and two charged criminal conspiracy. The defendants assert that their convictions on these counts must be reversed because (1) the indictment failed to provide adequate notice of the charges; (2) there was a fatal variance between the indictment and the evidence produced at trial; and (3) the district court refused their requested multiple conspiracy instruction.

A. Adequate Notice of the Charges

We review the sufficiency of an indictment de novo. *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1124, 127 L.Ed.2d 432 (1994). We will not reverse convictions for minor deficiencies in the indictment that cause no prejudice. *United States v. Flores*, 63 F.3d 1342, 1360 (5th Cir.1995); *United States v. Chappell*, 6 F.3d 1095, 1099 (5th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1232, 127 L.Ed.2d 576 and *cert. denied*, ___ U.S. ___, 114 S.Ct. 1235, 127 L.Ed.2d 579 (1994).

The defendants complain that counts one and two are "factually barren" and violate both FED.R.CRIM.P. 7(c)(1) and the Sixth Amendment, because "[a]llegations such as time, dates, places and persons involved and specific criminal acts, [sic] necessary to know the nature of the charges and prepare a defense simply are lacking." More particularly, the defendants argue that their attorneys could not adequately investigate the circumstances or the persons involved in any of the specific transactions involved in the alleged conspiracy.

The Sixth Amendment requires that an indictment (1) enumerate each prima facie element of the charged offense; (2) fairly inform the defendant of the charges filed against him; and (3) provide the defendant with a double jeopardy defense against future prosecutions. *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir.1991), *cert. denied*, 503 U.S. 939, 112 S.Ct. 1480, 117 L.Ed.2d 623 (1992). The dictates of FED.R.CRIM.P. 7 are essentially the same. *See United States v. Ellender*, 947 F.2d 748 (5th Cir.1991); *see also Nevers*, 7 F.3d at 62.

In *Ellender*, defendants convicted of conspiracy to import marihuana challenged the sufficiency of the indictment for failure to specify the time, location, and precise dates of acts involved in the conspiracy. We held that the indictment language " 'commencing in or about the month of July, 1982, and continuing through the month of August, 1984 . . . ' " was sufficient. *Id.* at 755-56 ("The precise dates on which the appellant committed the alleged acts are not necessary."). We also held that the language "in the Western District of Louisiana, and elsewhere" was sufficient to identify the location of the conspiracy. *Id.* The language of the indictment before us is nearly identical and therefore sufficient.[1]

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[1] The defendants rely upon *United States v. Cruikshank*, 2 Otto (92 U.S.) 542, 23 L.Ed. 588 (1875), to support their argument. But our holding in *Ellender* takes *Cruikshank* into consideration, at least derivatively. *Ellender* is the progeny of *United States v. Gordon*, 780 F.2d 1165 (5th Cir.1986), which explicitly considered *Cruikshank* before concluding that "the language of the statute may guarantee sufficiency if all required elements are included in the statutory language." *Id.* at 1171; *see United States v. Lavregne*, 805 F.2d 517, 521 (5th Cir.1986) (relying on *Gordon*); *Ellender*, 947 F.2d at 755-56 (relying on *Lavergne*).

Nor is it fatal that the indictment failed to identify specific criminal acts constituting the alleged conspiracy. The purpose of the indictment is to provide the defendant with notice of the offense with which he is charged. *See United States v. Hagmann*, 950 F.2d 175, 182 (5th Cir.1991), *cert. denied*, 506 U.S. 835, 113 S.Ct. 108, 121 L.Ed.2d 66 (1992). "[A]n indictment need not allege an overt act in furtherance of the conspiracy if the indictment alleges a conspiracy to distribute drugs, the time the conspiracy was operative, and the statute allegedly violated." *United States v. Khan*, 728 F.2d 676, 681 (5th Cir.1984).

While the defendants complain of the indictment's failure to identify unindicted coconspirators, they concede that the prosecution produced a list of forty-seven individuals five days prior to trial pursuant to an order by the district court. Five days' notice is certainly less than ideal, but the defendants cite no cases requiring that the indictment name unindicted coconspirator, nor do they provide evidence of any prejudice arising from the government's failure to disclose these names earlier. We therefore find no error.

B. Fatal Variance

The defendants maintain that a fatal variance existed between the evidence presented at trial – which they allege demonstrated the existence of six separate conspiracies – and the indictment, which alleged a single conspiracy. We may reverse a conviction when the defendant both proves a variance between the government's evidence at trial and the allegations in the indictment and demonstrates that the variance prejudiced his substantial

rights. *United States v. Morris*, 46 F.3d 410, 414 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2595, 132 L.Ed.2d 842, and *cert. denied*, ___ U.S. ___, 115 S.Ct. 2595, 132 L.Ed.2d 842 (1995); *United States v. Puig-Infante*, 19 F.3d 929, 935-36 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 180, 130 L.Ed.2d 115 (1994). We find no variance between the indictment and the evidence adduced at trial, and we therefore do not consider whether the defendants' substantial rights were prejudiced.

"We must affirm the jury's finding that the government proved a single conspiracy unless the evidence and all reasonable inferences, examined in the light most favorable to the government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt." *United States v. De Varona*, 872 F.2d 114, 118 (5th Cir.1989). To establish the existence of a drug conspiracy, the government must prove "(1) the existence of an agreement between two or more persons to violate the narcotics laws; (2) that each conspirator knew of the conspiracy and intended to join it; and (3) that each alleged conspirator participated in the conspiracy." *Morris*, 46 F.3d at 414-15. Among the factors to be considered in determining whether a single conspiracy was proven by the government are (1) the existence of a common goal, (2) the nature of the scheme, and (3) whether the participants overlapped. *Id.* at 415; *Puig-Infante*, 19 F.3d at 936.

The evidence was sufficient to support a finding of a single conspiracy under the above standard. The common goal of the conspiracy was financial gain through the importation and distribution of cocaine from El Paso to

California. The evidence demonstrated that each defendant played a particular role in the conspiracy. Intercepted conversations between Macias and Gandara, viewed in combination with testimony and tape recordings of each of them regarding other transactions, suggests that they were heavily involved in the planning and distribution of the cocaine. There was evidence that Gaytan counted and stored 115 kilograms of cocaine at his home at Macias's direction. Macias was also involved with the storage of money at Gaytan's residence. Taken in conjunction, the evidence demonstrates significant overlap between the defendants, with each performing special functions critical to the overall success of the enterprise. A reasonable juror considering this evidence could find that a single conspiracy existed. *See Morris*, 46 F.3d at 416 (holding that "the existence of a single conspiracy will be inferred where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect or to the overall success of the venture").

III. The Multiple Conspiracy Instruction

The defendants next argue that the court erred by denying their request to give the Fifth Circuit Pattern Jury Instruction. We review a refusal to give a requested jury instruction for abuse of discretion. *Morris*, 46 F.3d at 418. We reverse only if the proposed instruction is (1) substantively correct, (2) was not substantially covered in the charge actually delivered to the jury, and (3) concerns an important point in the trial so that failure to give it seriously impaired the defendant's ability to present a defense effectively. *Id.* at 418-19; *United States v. Storm*, 36

F.3d 1289, 1294 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1798, 131 L.Ed.2d 725 (1995).

The substance of the requested instruction was adequately covered by the charge. The court departed from the Pattern Jury Instruction to offer a more precise one because more than one conspiracy count was alleged in the indictment. In doing so, the court did not abuse its discretion.

IV. The Roving Wiretap

Much of the government's evidence consisted of tape recordings and transcripts of the defendants' cellular telephone conversations obtained through a wiretap. Macias and Gandara contend that the district court erred by denying their motions to suppress that evidence. They argue that the "roving wiretap" provision of 18 U.S.C. § 2518(11)(b), which the government relied on when obtaining the wiretap order, violates the Fourth Amendment. If the provision is constitutional, they maintain the district court nonetheless should have suppressed the conversations because the government failed to comply with the statutory requirements for a roving wiretap.

A. Constitutionality of the Roving Wiretap Provision

The defendants argue that a roving wiretap violates the particularity requirement of the Fourth Amendment because it authorizes interceptions without requiring the government to identify the place of interception in the

warrant. Only the Ninth Circuit has addressed the constitutionality of the roving wiretap provision, and it found the provision acceptable. *See United States v. Petti*, 973 F.2d 1441 (9th Cir.1992), *cert. denied*, 507 U.S. 1035, 113 S.Ct. 1859, 123 L.Ed.2d 480 (1993); *see also United States v. Bianco*, 998 F.2d 1112, 1122-24 (2d Cir.1993) (upholding constitutionality of "roving bugs" to intercept oral communications not transmitted via wire or electronic means on similar grounds), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1644, 128 L.Ed.2d 364 (1994). *Petti* noted that § 2518 permits only surveillance of telephone facilities used by a speaker identified in the wiretap order and excuses the identification of particular telephone facilities only if the government establishes that the person to be intercepted has attempted to evade surveillance by changing facilities. *Petti*, 973 F.2d at 1445. We find *Petti* persuasive and join the Ninth Circuit in finding the roving wiretap provision constitutional.

B. Conformity with Statutory Requirements

The defendants next argue that the government failed to comply with the requirements of § 2518. First, they complain that the wiretap order itself allowed the interception of conversations of persons not identified in the order. As a result, they argue that conversations between parties not specifically named in the order were intercepted by federal agents. They also maintain that the government failed to follow procedures to minimize the interception of such conversations. Second, the defendants assert that the affidavit submitted by the government in support of its application was insufficient to demonstrate that the defendants had attempted to evade

surveillance. The defendants suggest that the proper remedy for these deficiencies is the suppression of all intercepted communications.

It is true that the order allowed the interception of telephone conversations that did not involve a person specifically named in the order. As written, the order permitted the "intercept[ion of] wire communications of JESUS GREGORIO MACIAS-MUNOZ, aka Jesse Macias, Tocayo; . . . RENE GANDARA-GRANILLO, aka Compa, Compa; . . . and others yet unknown" (emphasis added). The government contends that this was a mere clerical error and that the order should have read "with others yet unknown." It is also true that the government intercepted many phone calls that did not involve any of the parties specifically named in the order, though it maintains that it properly screened calls and terminated interception when it became apparent that none of the named parties was involved in the conversation.

Even assuming the order to be overly broad and some of the interceptions to have been improper, the district court corrected the matter by excluding from evidence "[i]nterceptions from the cellular telephones not involving at least one of these individuals [named in the wiretap order] as a party to the conversation." The exclusionary rule does not require the exclusion of those conversations that were properly intercepted as well. *See United States v. Morris*, 977 F.2d 677, 682 (1st Cir.1992) (holding partial suppression sufficient where search warrant valid as to some items but not as to others), *cert. denied*, 507 U.S. 988, 113 S.Ct. 1588, 123 L.Ed.2d 155 (1993); *United States v. Baldwin*, 987 F.2d 1432, 1436 (9th Cir.) (holding that only items seized pursuant to invalid

portions of warrant must be suppressed), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2948, 124 L.Ed.2d 696 (1993).

The defendants' second argument – that the government did not demonstrate that the defendants had engaged in conduct to thwart surveillance – also fails. The affidavit of Elias Hernandez supporting the government's request for the wiretap order indicated that the defendants had engaged in a pattern of changing cellular phone numbers in an effort to avoid surveillance.

V. The Admission of Gaytan's Post-Arrest Statement

Gaytan argues that the district court erred by admitting his statement to an FBI agent following his arrest on February 4, 1993, that he had stored cocaine at his house for Jaime Carrera approximately six months earlier. Gaytan urges that this statement was inadmissible because it referred to a period not named in the indictment and was therefore evidence of another crime. He also contends that it was obtained in violation of his Sixth Amendment right to counsel.

We review the admission of Gaytan's statement under the evidence rules for plain error, as Gaytan failed to raise an objection at trial. *See, e.g., United States v. Vaquero*, 997 F.2d 78, 83 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 614, 126 L.Ed.2d 578 (1993). We conclude that it was not plain error for two reasons. First, FED.R.EVID. 404(b) allows the admission of evidence of other crimes to establish "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," although such evidence is inadmissible "to prove the character of a person in order to show action in

conformity therewith." It was within the court's discretion to determine whether the government sought to admit the statement for the former, legitimate reason or the latter, inappropriate one. Furthermore, Gaytan's statement may have been admissible because it referred to a vague time period. Gaytan indicated that he had stored cocaine with Carrera "approximately" six months prior to his arrest, or August 4, 1992. The indictment covers a period ending in June 1992. "Approximately" implies a margin of error. It is therefore possible that Gaytan's admission did refer to the period named in the indictment.

Gaytan's Sixth Amendment claim is equally without merit. Although the Sixth Amendment right to counsel attaches at indictment, *see Michigan v. Jackson*, 475 U.S. 625, 629-30, 106 S.Ct. 1404, 1407-08, 89 L.Ed.2d 631 (1986) (stating that right to counsel attaches when adversary judicial proceedings are initiated), the "mere attachment" of Sixth Amendment rights does not prevent law enforcement officers from attempting to interrogate the defendant. *Montoya v. Collins*, 955 F.2d 279, 282 (5th Cir.), *cert. denied*, 506 U.S. 1036, 113 S.Ct. 820, 121 L.Ed.2d 692 (1992). As long as the defendant is given Miranda warnings, his voluntary decision to answer questions without invoking the right to counsel constitutes waiver. *Id.*

An FBI agent testified at trial that Gaytan was advised of his right to consult with an attorney before answering any questions and that Gaytan indicated that he understood those rights and elected to talk with the arresting agent. He therefore waived his right to counsel.

VI. Failure To Provide a Limiting Instruction

Although most of the evidence presented at trial related to counts three through eleven, Gaytan was not indicted on those counts. He maintains that the district court erred by failing to instruct the jury that it should not consider, against him, evidence that related solely to counts three through eleven. Because he failed to request such a limiting instruction, we review for plain error. *United States v. Prati*, 861 F.2d 82, 86 (5th Cir.1988).

Although the court did not issue a limiting instruction, it did instruct the jury that "[e]ach offense and evidence pertaining to it should be considered separately." Furthermore, Gaytan's counsel informed the jury that his client was "charged only with the first two counts" and that "he's not charged in any kidnapping counts or using the telephone or money laundering." Although Gaytan complains that the prosecutor stated in closing arguments that "they [the defendants] have been involved in tortures, in abductions, and that is what is at the heart of this case," we do not believe this statement was prejudicial. The prosecutor subsequently clarified that only two persons – Macias and Gandara – were responsible for the kidnappings and torture. We find Gaytan's argument without merit because "the charge, considered as a whole, [was not] so clearly erroneous as to result in a likelihood of a grave miscarriage of justice." *Id.* (quoting *United States v. Varkonyi*, 645 F.2d 453, 460 (5th Cir. Unit A May 1981)).

VII. The Money Laundering Convictions

Macias and Gandara challenge the sufficiency of the evidence to support their convictions for money laundering under 18 U.S.C. § 1956(a)(1)(A)(i). We view the evidence in the light most favorable to the jury verdict and affirm if a rational trier of fact could have found that the government proved all essential elements of the offense beyond a reasonable doubt. *Puig-Infante*, 19 F.3d at 937. To support a conviction for money laundering under § 1956(a)(1)(A)(i), the government must prove that (1) the defendant conducted or attempted to conduct a financial transaction, (2) which the defendant then knew involved the proceeds of unlawful activity, (3) with the intent to promote or further unlawful activity. *Id.*; *United States v. Morris*, 46 F.3d at 423.

Macias and Gandara maintain that there was insufficient evidence that they had conducted a "financial transaction" with the proceeds of unlawful activity. In *Puig-Infante*, we distinguished a transaction of funds from mere transportation of funds, noting that a transaction involved "a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition. . . . " 19 F.3d at 938 (quoting 18 U.S.C. § 1956(c)(3)). "[F]or something (not involving a financial institution or its facilities) to be a transaction, it must be a 'disposition.' 'Disposition most commonly means 'a placing elsewhere, a giving over to the care or possession of another.' " *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 654 (1961)). We also observed that funds do not become the proceeds of drug trafficking until a sale of drugs is completed. Hence, a transaction to pay for illegal drugs is not money laundering, because the funds involved are not proceeds of an

unlawful activity when the transaction occurs, but become so only after the transaction is completed: However, because the money did not become proceeds of unlawful activity until the sale of the marihuana was completed, what the government describes as one transaction is actually two separate actions: the first, the sale by the Puigs of the marihuana to the Willises and their payment to Abigail Puig for same, is a transaction (and an unlawful one) but is not shown to have been one which involved the proceeds of unlawful activity; the second, Abigail Puig's transportation of the money from Florida to Laredo, involves the proceeds of unlawful activity but is not a transaction. *Id.* at 939.

Applying this standard, we reverse Macias's conviction on count six and Gandara's conviction on count four. In both cases, Jorge Aguilera owed Macias money for a drug debt. Macias sent a third party – Raul and Gloria Pimentel in one instance and Jaime Carrera in the other – to retrieve the money. The money did not become the proceeds of drug trafficking, however, until Macias (or Gandara)[2] received it. Nor is there any evidence indicating that Aguilera obtained the money through unlawful activity. Thus, while it is true that several transactions took place, none involved the proceeds of unlawful activity.

We affirm Macias's conviction on count three and Gandara's conviction on count five. With respect to count three, Macias contends only that no transaction occurred.

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[2] The Pimentels were to deliver the money to Macias himself, while Carrera delivered the money to Gandara.

He concedes, however, that there was evidence that he received $2,000,000 from Navarro, which he then stored at Gaytan's residence, and that Navarro later retrieved the money. By delivering the proceeds to Gaytan's residence for storage and later to Navarro at Sunset Motors, Macias effected a "placing elsewhere" or "giving over to the care or possession of another" sufficient to establish a disposition of the funds.

We affirm Gandara's conviction on count five on the basis of Carrera's testimony that he and his brother delivered the proceeds of a cocaine sale to Gandara in El Paso. The delivery from Carrera to Gandara was a transaction, and, because Carrerra obtained the funds from a drug sale, the transaction involved the proceeds of an unlawful activity.

VIII. The Kidnapping Counts

Macias and Gandara argue that the district court committed reversible error by not dismissing the kidnapping counts for failing to name the alleged victims. We find no merit in this argument. Although the court did not dismiss the indictment, it did order the government to identify the victims and the government complied.

The defendants claim prejudice because the court ordered that the government disclose the victims' names on September 1, less than two weeks before trial. Any prejudicial delay, however, was the defendants' own fault, for they waited until August to move for dismissal. It is true that they requested a bill of particulars in April, and the court indicated that they were entitled to know

the names of the kidnapping victims,[3] but they failed promptly to file a motion for dismissal when the government did not disclose the names. We find no reversible error.

IX. Failure Properly To Swear a Witness

Gaytan asserts that the district court committed plain error by failing properly to swear a government witness. He raised no objection to this failure at trial, however. It is the general rule that a defendant who does not object to a failure to swear a witness at trial waives any right to raise that issue on appeal. *United States v. Perez*, 651 F.2d 268, 273 (5th Cir. Unit A July 1981). Gaytan has provided us with no reason to depart from that rule here. We therefore deem this claim to have been waived.

X. Impeachment Information in the Presentence Reports

The district court conducted an in camera review of the sealed presentence reports of two government witnesses, Jaime Carrera and Alejandro Navarro, pursuant to *United States v. Jackson*, 978 F.2d 903, 909 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2429, 124 L.Ed.2d 649 (1993). Macias and Gaytan contend that the court erred in its determination that the reports contained no impeachment evidence to which they were entitled. We review for clear error only. *See, e.g., United States v. Mora*, 994 F.2d 1129, 1139 (5th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 417, 126 L.Ed.2d 363 (1993). We will not reverse

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[3] The court did not actually order the government to disclose the names until September 1, however.

unless "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). Upon careful consideration of the pages cited by the defendants in their briefs, we conclude that the district court's determination was not clearly erroneous.

XI. Gaytan's Ineffective Assistance of Counsel Claim

Gaytan asserts that he received ineffective assistance of counsel at trial. He did not raise this claim before the district court, however, and we generally will not review an ineffective assistance of counsel claim for the first time on direct appeal. *United States v. Navejar*, 963 F.2d 732, 735 (5th Cir.1992) (noting that we consider " 'claims of inadequate representation on direct appeal only in rare cases where the record allow[s] us to fairly evaluate the merits of the claim' ") (quoting *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir.1987), *cert. denied*, 484 U.S. 1075, 108 S.Ct. 1051, 98 L.Ed.2d 1013 (1988)); *United States v. Bounds*, 943 F.2d 541, 544 (5th Cir.1991).

While Gaytan alleges several errors that may support a claim of ineffective assistance of counsel, no hearing was held in the district court to develop a record. Nor is the record sufficient to resolve the question. We therefore decline to hear this claim, without prejudice to Gaytan's ability to raise it in a habeas corpus proceeding.

XII. Sentencing Issues

A. Quantity of Drugs for Calculating Base Offense Level

Macias and Gandara contend that the district court failed to make adequate findings regarding the quantity of drugs attributable to them as required by FED.R.CRIM.P. 32(c)(1), which provides that "[f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." *Id.* At sentencing, the defendants contested the amount of drugs attributed to them in the presentence report ("PSR"). The district court then entered a separate finding with respect to each defendant, stating that a preponderance of the evidence established that each had been involved in a conspiracy involving not less than 1,500 kilograms of cocaine.

Rule 32 does not " 'require a catechismic regurgitation of each fact determined and each fact rejected.' " *Puig-Infante*, 19 F.3d at 943 (quoting *United States v. Sherbak*, 950 F.2d 1095, 1099 (5th Cir.1992)); *see also United States v. Mora*, 994 F.2d at 1141 ("The defendant is generally provided adequate notice of the district court's resolution of the disputed facts when the court merely adopts the findings of the PSR."). In *Puig-Infante*, we held that the district court's findings satisfied rule 32 where the court expressly had adopted the findings in the PSR regarding the amount of drugs attributable to the defendant and explained that its decision to adopt the findings

was based upon its assessment of the testimony presented by the government. 19 F.3d at 943. The facts of this case are indistinguishable: The court adopted the findings in the PSR and found that a preponderance of the evidence indicated that the defendants had been involved in a conspiracy involving "not less than 1,500 kilograms of cocaine." This satisfied the rule.

Macias and Gandara also contend that the information relied upon by the district court did not possess "sufficient indicia of reliability" as required under U.S.S.G. § 6A1.3(a), p.s. They assert that the court erred by relying upon quantity calculations contained in the PSR's that were based almost entirely on the unreliable testimony of Jaime Carrera, a coconspirator turned government witness. They argue that they demonstrated multiple inconsistencies in Carrera's testimony and that Carrera's status as a cooperating government witness undermined his credibility.

We review the district court's findings for clear error.[4] For purposes of sentencing, "the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of

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[4] *See United States v. Young*, 981 F.2d 180, 185 n. 7 (5th Cir.1992) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently.") (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 565, 105 S.Ct. 1504, 1507, 84 L.Ed.2d 518 (1985) (syllabus)), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2983, 125 L.Ed.2d 680 and *cert. denied*, ___ U.S. ___, 113 S.Ct. 2454, 124 L.Ed.2d 670 (1993).

reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a), p.s.; *see, e.g., United States v. West*, 58 F.3d 133, 138 (5th Cir.1995). Even uncorroborated hearsay evidence may be sufficiently reliable. *Id.*

The court's findings are not clearly erroneous. While Macias and Gandara dispute the reliability of Carrera's testimony, they do not demonstrate that his testimony regarding the quantity of cocaine was "materially untrue." *Young*, 981 F.2d at 185 ("The defendant bears the burden of demonstrating that the information the district court relied on is 'materially untrue.' "). Much of Carrera's testimony was corroborated by the testimony of other witnesses, the defendants' own statements, and wiretap interceptions. The fact that portions of Carrera's testimony are uncorroborated is not fatal, especially as Carrera was subject to extensive cross-examination at trial.

Macias and Gandara finally maintain that due process requires the government to prove beyond a reasonable doubt the quantity of drugs attributable to them. We ordinarily apply a preponderance of the evidence standard to such findings. The defendants urge that applying the preponderance standard here allows the government to obtain a mandatory life sentence without complying with the stricter burden of proof employed in other mandatory life cases. They argue that the need for the stricter standard of proof is particularly compelling in a case in which only forty-five kilograms of cocaine were actually seized.

It is well-established that the preponderance standard is the applicable standard for sentencing purposes.

United States v. Angulo, 927 F.2d 202, 205 (5th Cir.1991); *United States v. Billingsley*, 978 F.2d 861, 866 (5th Cir.1992), *cert. denied*, 507 U.S. 1010, 113 S.Ct. 1661, 123 L.Ed.2d 280 (1993). The defendants cite no authority holding that a different standard should apply under these circumstances. In fact, we recently rejected an argument involving similar facts. *See United States v. Mergerson*, 4 F.3d 337, 344 (5th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1310, 127 L.Ed.2d 660 (1994) (rejecting application of reasonable doubt standard to quantity finding that required mandatory life sentence without possibility of release).

Nor is it significant that only forty-five kilograms were seized. The guidelines specifically state that "[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance." U.S.S.G. § 2D1.1, comment. (n. 12). We therefore conclude that the court properly calculated the amount of drugs attributable to Macias and Gandara.

B. Weapon Enhancement

Macias challenges the district court's finding that a two-level enhancement was warranted for the possession or use of a dangerous weapon on the drug conspiracy counts, the kidnapping counts, and the telephone counts. The district court's determination that a weapon was present and that its possession by a co-conspirator was foreseeable is a factual finding reviewable for clear error.[5]

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[5] *United States v. Sparks*, 2 F.3d 574, 587 (5th Cir.1993) (foreseeability), *cert. denied*, ___ U.S. ___, 114 S.Ct. 720, 126

The district court applied the enhancement to the drug conspiracy counts pursuant to U.S.S.G. § 2D1.1(b)(1). The increase applies if a dangerous weapon was possessed during the course of manufacturing, importing, exporting, or trafficking in narcotics, including attempting or conspiring to do so. *Id.* If only a coconspirator possessed a dangerous weapon, the enhancement applies if his possession was reasonably foreseeable to the defendant. *Sparks*, 2 F.3d at 586-87. A court " 'may ordinarily infer that a defendant should have foreseen a codefendant's possession of a dangerous weapon, such as a firearm, if the government demonstrates that another participant knowingly possessed a weapon while he and the defendant committed the offense.' " *Id.* (quoting *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir.1990)).

The district court expressly stated that it was basing the enhancement on a confrontation between Macias and Alejandro Navarro regarding missing proceeds from a drug transaction. Navarro testified that he saw a gun in the belt of Julio Bustillos, who accompanied Macias to the confrontation.

Macias argues that the enhancement should not have been applied because "Navarro did not testify that Macias possessed a weapon, knew that [Bustillos] had a

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L.Ed.2d 684, and *cert. denied*, ___ U.S. ___, 114 S.Ct. 899, 127 L.Ed.2d 91, and *cert. denied*, ___ U.S. ___, 114 S.Ct. 1548, 128 L.Ed.2d 198 (1994); *United States v. Fierro*, 38 F.3d 761, 775 (5th Cir.1994) (presence of weapon), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1388, 131 L.Ed.2d 240 and *cert. denied*, ___ U.S. ___, 115 S.Ct. 1431, 131 L.Ed.2d 312 (1995).

gun, or was in a position to have seen that [Bustillos] possessed a gun." Even if Macias did not know that Bustillos was carrying a gun, however, the court could properly infer, from the fact that Bustillos actually had a gun, that he could have reasonably foreseen that Bustillos would have one. *Sparks*, 2 F.3d at 586-87.

Macias also complains that the court improperly applied the enhancement to the telephone counts. We cannot determine whether the enhancement should have been applied, however, because the district court applied the wrong sentencing guideline. The court adopted the PSR's recommendations in toto on the telephone counts, although the PSR applied U.S.S.G. § 2E1.4 to those counts. That section determines the sentence for violations of 18 U.S.C. § 1958 (prohibiting the use of interstate facilities in the commission of murder-for-hire). The PSR should have applied U.S.S.G. § 2E1.2, which controls the sentence for violations of 18 U.S.C. § 1952 (prohibiting the use of interstate facilities in aid of a racketeering enterprise). We therefore vacate Macias's sentence on counts ten and eleven and remand for resentencing under U.S.S.G. § 2E1.2.

Macias finally attacks the district court's finding that an enhancement was appropriate with respect to the kidnapping counts. U.S.S.G. § 2A4.1(b)(3) provides for a two-level enhancement for use of a dangerous weapon in kidnapping, abducting or unlawfully restraining another. " 'A dangerous weapon was used' means that a firearm was discharged . . . or 'otherwise used.' " *Id.* at § 2A4.1, comment. (n. 2). " 'Otherwise used' . . . means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying or possessing a

firearm or other dangerous weapon." *Id.* at § 1B1.1, comment. (n. 1(g)).

The kidnapping counts were based on the abduction of Ricardo Olivares and Humberto Adame. The government presented evidence that Adame was hit with a gun and that Olivares had a gun put to his back. It was not clear error for the district court to enhance Macias's sentence on this basis.

C. Enhancement for Restraint of Victim

Macias and Gandara next complain that the district court erred by applying a two-level enhancement to their sentences on the conspiracy counts for the physical restraint of a victim. U.S.S.G. § 3A1.3 authorizes a two-level enhancement "[i]f a victim was physically restrained in the course of the offense." The defendants argue that the enhancement should not apply to them for two reasons. First, the persons physically restrained were not "victims," but coconspirators. Second, it would be impermissible double counting to apply the enhancement for unlawful restraint and also to sentence the defendants for kidnapping.

The first argument rests on an [sic] narrow construction of the term "victim" in § 3A1.3. The defendants read "victim" to mean "victim of the offense." We agree that Olivares and Adame were not "victims" of the conspiracy offense, and if we read § 3A1.3 to mean "victims of the offense," the enhancement could not apply. The plain language of § 3A1.3 refers only to "victims," however, and we believe this means any "victim" of restraint. *See United States v. Vought*, 69 F.3d 1498, 1502 (9th Cir.1995) (interpreting § 3A1.3 in same

manner). We also note that the guidelines do frequently use the term "victim of the offense," leading us to believe that the Sentencing Commission may have deliberately chosen not to use that phrase here.[6] The court correctly applied the enhancement because Olivares and Adame were "victims" of unlawful restraint.

The defendants further argue that application of the enhancement to the drug conspiracy counts is impermissible double counting because they also received sentences on the kidnapping counts. They rely on *United States v. Harris*, 959 F.2d 246 (D.C.Cir.), *cert. denied*, 506 U.S. 932, 113 S.Ct. 362, 121 L.Ed.2d 275 and *cert. denied*, 506 U.S. 932, 113 S.Ct. 362, 121 L.Ed.2d 275 and *cert. denied*, 506 U.S. 933, 113 S.Ct. 364, 121 L.Ed.2d 277 (1992), and on application note 2 to U.S.S.G. § 3A1.3 to support their proposition.

This argument is without merit. Application note 2 states: Do not apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of the victim is an element of the offense itself (e.g., this adjustment does not apply to offenses covered by § 2A4.1 (Kidnapping, Abduction or Unlawful Restraint)). U.S.S.G. § 3A1.3, comment. (n. 2). Unlawful restraint is not an element of conspiracy to import or distribute drugs, the offense for which the

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[6] *See, e.g.*, U.S.S.G. § 3A1.1 (two-level increase "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable") (emphasis added); § 3A1.2, comment. (n. 1) (three-level increase for official victim applies "when specified individuals are victims of the offense") (emphasis added).

defendants were sentenced. Application note 2 is therefore inapplicable.

Nor does Harris support the defendants' argument. Harris held that an enhancement for possession of a firearm during a drug conspiracy did not apply to a defendant who received a separate sentence for using or carrying a firearm during a drug conspiracy. Harris, 959 F.2d at 266-67. The court relied upon U.S.S.G. § 2K2.4, comment. (n. 2), which states: Where a sentence under this section [for carrying or using a firearm during a crime] is imposed in conjunction with a sentence for an underlying offense [the drug conspiracy], any specific offense characteristic for the possession, use, or discharge of an explosive or firearm . . . is not to be applied in respect to the guideline for the underlying offense. In contrast, the enhancement for victim restraint is prohibited only where "unlawful restraint of the victim is an element of the offense itself." U.S.S.G. § 3A1.3, comment. (n. 2).

Double counting is impermissible only where the guidelines at issue prohibit it. *United States v. Box*, 50 F.3d 345, 359 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 309, 133 L.Ed.2d 213 (1995), and *cert. denied*, ___ U.S. ___, 116 S.Ct. 714, 133 L.Ed.2d 668 (1996); *United States v. Godfrey*, 25 F.3d 263, 264 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 429, 130 L.Ed.2d 342 (1994). The guidelines at issue in *Harris* did specifically forbid double counting, but § 3A1.3 does not.[7]

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[7] This result is hardly unfair to the defendants. Because their sentence on the kidnapping counts runs concurrently with

D. Enhancement for Role in Conspiracy

Macias and Gandara contest the four-level enhancement on all counts for their leadership roles in the offenses. See U.S.S.G. § 3B1.1(a). We review for clear error the finding that the defendants were leaders or organizers of the conspiracy. *United States v. Ayala*, 47 F.3d 688, 689-90 (5th Cir.1995).

Both defendants argue that they could not have occupied leadership roles in the conspiracy because others were above them in the hierarchy of the conspiracy. Gandara maintains that he was simply a bookkeeper until his brother Jose Luis died in January 1991. Macias argues that he was subordinate to both Jose Luis and Rene Gandara.

More than one person can qualify as a leader or organizer of a conspiracy. U.S.S.G. § 3B1.1, comment. (n. 4). During the course of the trial, the government introduced significant evidence that both Macias and Gandara exercised extensive control over others in the organization, directing them in the distribution of the cocaine, the collection of the proceeds, and the kidnapping and intimidation of others. This evidence was sufficient to support the determination that they were organizers or leaders of the conspiracy.

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their sentence on the conspiracy counts, and is less than the sentence on the conspiracy counts, it is only through the enhancement to the conspiracy counts that the defendants will suffer any penalty for the kidnapping.

E. Refusal To Grant Downward Departure

Macias and Gandara argue that the district court incorrectly believed that it lacked the authority to depart downward in sentencing. *See United States v. Stewart*, 37 F.3d 1449, 1450 (10th Cir.1994); *United States v. Isom*, 992 F.2d 91, 93 (6th Cir.1993). At sentencing, they urged the district court to depart downward. The district court declined to do so, stating: As far as the departure request, and also the alternative request that the Court recommend executive clemency. . . . I don't anticipate doing either one of those things. On the contrary, I anticipate imposing sentence within the guideline range on all of the various counts. In light of this statement, we conclude that the court did recognize its authority to depart downward.

F. Imposition of Life Imprisonment on Counts Ten and Eleven

The district court imposed a life sentence on Macias with respect to counts ten and eleven, although the maximum penalty for those offenses is imprisonment for five years. 18 U.S.C. § 1952. The government concedes error, so we vacate Macias's sentence with respect to those counts and remand for resentencing for a period of no more than five years.

G. The Sentencing of Gaytan as a Minor Participant

Gaytan asserts that the district court erred in finding that he was a "minor participant" in the conspiracy under U.S.S.G. § 3B1.2(b) rather than a "minimal participant"

under U.S.S.G. § 3B1.2(a). As a result, he received only a two-point reduction in his base offense level rather than the four-point reduction afforded a "minimal participant."

The district court's finding on this issue is a factual determination reviewed only for clear error. *United States v. Valencia*, 44 F.3d 269, 272 (5th Cir.1995). The Sentencing Guidelines indicate that the downward adjustment for minimal participation "will be infrequent[ ]" and cites as appropriate examples of minimal participants "someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment" or "an individual [who] was recruited as a courier for a single smuggling transaction involving a small amount of drugs." U.S.S.G. § 3B1.2, comment. (n. 2). In contrast, "a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." *Id.*, comment. (n. 3).

The district court's finding that Gaytan "len[t] his property to be used for the storing of drugs" and "acted as a chauffeur" to carry people to where drugs were stored is supported by the record. Given these findings, it was not clear error for the court to conclude that Gaytan was a minor participant rather than a minimal participant.

Macias's conviction on all counts except count six is AFFIRMED. Macias's sentence on all counts except counts ten and eleven is AFFIRMED. Gandara's conviction and sentence on all counts except count four are AFFIRMED. Gaytan's conviction and sentence are

AFFIRMED. Macias's conviction on count six and Gandara's conviction on count four are REVERSED. Macias's sentence on counts ten and eleven is VACATED and REMANDED for resentencing.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50055

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ALFREDO GAYTAN; JESUS GREGORIO MACIAS-MUNOZ, also known as Jesse Macias, RENE GANDARA-GRANILLO

Defendants-Appellants

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON PETITIONS FOR REHEARING

(March 13, 1996)

Before GARWOOD, SMITH and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are DENIED.

ENTERED FOR THE COURT:

/s/ Judge Smith
United States Circuit Judge

REHG-13